

# Chief Ombudsman's opinion on OIA requests about Operation Burnham

<b>Legislation</b>	Official Information Act 1982, ss, 6(a),(b), 9(2) (a),(h) (see appendix for full text)
<b>Requester</b>	Multiple
<b>Agency</b>	New Zealand Defence Force
<b>Request for</b>	Information about Operation Burnham
<b>Ombudsman</b>	Peter Boshier
<b>Case numbers</b>	452111, 453166, 455308, 450612,458164
<b>Date</b>	9 April 2018

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## Summary

Following the publication of the book *Hit & Run* in March 2017, a number of people made requests under the Official Information Act (OIA) to the New Zealand Defence Force (NZDF) for information about Operation Burnham.

NZDF withheld much of the requested information primarily on the basis that release of the information would be likely to prejudice the security and defence of New Zealand or the future entrusting of information to New Zealand.

The Chief Ombudsman received several complaints about NZDF's decisions on these requests and decided to investigate them together.

During the investigation, following discussions with the Chief Ombudsman, NZDF agreed to release some further information. This was released on NZDF's website on 6 March 2018.

This has been a substantial investigation in which a considerable amount of material has been considered. It has accordingly taken some time to conclude.

After careful consideration of the information at issue, comments from NZDF and comments from the requesters, the Chief Ombudsman formed the opinion that NZDF's refusal of the majority of the remaining information was justified under sections 6(a) and (b) of the OIA.

However the Chief Ombudsman considered that there was no basis for refusing copies of briefing papers in full, or for refusing to respond to questions about the identification of insurgent casualties and has recommended that NZDF release this information.

## Publication of ‘Hit & Run’

1. On 21 March 2017, investigative journalists Nicky Hager and Jon Stephenson launched their book ‘Hit & Run’ which gives an account of an operation, referred to as Operation Burnham, on 22 August 2010 in Baghlan province, Afghanistan. The book describes the operation as having been led by the New Zealand Special Air Service (NZSAS) in conjunction with members of the Afghan Crisis Response Unit (CRU) and air support from the United States.
2. The key premise of the book is that during Operation Burnham a number of civilians, including a child, were killed or injured with no aid or assistance being given afterward. The book also claims that people’s houses were deliberately destroyed and in one case a room containing religious books was also targeted. There were also allegations of torture or beating of a suspected insurgent. These allegations, if true, could amount to war crimes. The book alleges that the real facts of the operation have been covered up by the authorities and calls for an inquiry to be conducted.
3. The Chief of Defence Force responded to the launch of the book with a press conference on 27 March 2017 contending that there were ‘*major inaccuracies*’ in the book, particularly with regard to the location of the operation, and allegations of civilian deaths. The Chief of Defence Force gave a summary of the operation which included background context, planning, and a description of the operation itself accompanied by a PowerPoint presentation showing where various actions took place. The matter gained significant media attention.

## Investigation into OIA complaints

4. Following the publication of ‘Hit & Run’, a number of people made OIA requests to NZDF for information about Operation Burnham. I received complaints from five requesters about the decisions made by NZDF on their various requests.
5. I decided to investigate these complaints together as they overlap in a number of areas. The timeline of my investigation can be found at Appendix 2.
6. At Appendix 3 I have provided a table of the specific requests and refusals that were the subject of this investigation. The complaints I received related to the refusal of information under the following broad headings:
  - The Rules of Engagement in force at the time of the operation
  - The location of Operation Burnham
  - Post activity reports and any inquiry or review relating to Operation Burnham
  - Photographs and video taken during the operation
  - Questions about civilian casualties

- Reports and review documentation prepared by ISAF <sup>1</sup>
  - The alleged mistreatment of a prisoner, Qari Miraj
  - Advice provided to the Minister of Defence and the Prime Minister
7. I have expressed my opinion on these complaints in two parts. First I explain the approach I have taken to the general themes of national security and international relations which permeate through all the categories of information at issue in these complaints. I respond to matters raised by requesters on these issues. Secondly I have set out my findings on the particular category of information that was refused.

## National security and international relations

### Sections 6(a) and (b) of the OIA

8. Section 6(a) provides good reason to withhold official information if its release *‘would be likely’* to *‘prejudice the security or defence of New Zealand, or the international relations of the Government of New Zealand’*.
9. Section 6(b) provides good reason to withhold official information if its release *‘would be likely’* to *‘prejudice the entrusting of information to the Government of New Zealand on a basis of confidence’* by the Government of any other country or any agency of such a Government (section 6(b)(i)) or by any international organisation (section 6(b)(ii)).
10. The Court of Appeal has interpreted the phrase *‘would be likely’* to mean *‘a serious or real or substantial risk to a protected interest, a risk that might well eventuate’*.<sup>2</sup> This means that there must be more than a mere possibility of the predicted prejudice occurring, but is a lower threshold than the balance of probabilities.
11. The grounds for withholding information under section 6 are *‘conclusive’*. If it is established that good reason exists under section 6 for withholding the information sought, that is the end of the matter. An Ombudsman on review is not empowered to recommend disclosure of such information in the public interest.
12. The rationale for conclusive grounds is explained by the Danks Committee in its general report which led to the enactment of the OIA<sup>3</sup>.

#### ***Interests of the Country as a Whole***

35. *One general area for which it is generally accepted that protection is needed, can be collectively described under a ‘nation interests’ heading. It includes such fields as security, defence, and international relations...*

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<sup>1</sup> International Security Assistance Force – NATO led security mission in Afghanistan

<sup>2</sup> *Commissioner of Police v. Ombudsman* [1988] 1NZLR.385,391

<sup>3</sup> *Towards Open Government*, 1980, page 17, paragraphs 35 and 38

...

38. *It is also widely recognised that much of the information under these headings can be sensitive not so much for what it reveals as for the need to protect its sources. The then Chief Ombudsman, in his report on the Security Intelligence Service (1976, p20), reached the conclusion that information received by New Zealand from its friends is of major importance in the political, economic and strategic policy making fields. It is in the national interest to continue to get as much of this information as possible. While a good deal of it is in the public domain, some is not. Much of the latter is provided on the clear understanding that it will be afforded in New Zealand substantially the same degree of security as it is afforded in the country of origin. These considerations have led us to propose that in the areas described in this section... protection from disclosure shall be absolute if disclosure is likely to prejudice essential interests including the continued flow of information.*

13. By enacting section 6 of the OIA, Parliament has identified that the wider public interest requires information to be withheld where the requirements of the section are met.

## **Security and defence of New Zealand**

14. One of the primary reasons for the refusal of requests about Operation Burnham was the concern that release of the source information would seriously compromise operational security, and thus the security and defence of New Zealand, which is an interest protected by section 6(a) of the OIA.
15. The requesters argued that NZDF had significantly overstated the operational security risk of releasing information. I was alerted to the vast volume of detailed information publicly available about military operations in Afghanistan. Some of this information has reached the internet through unauthorised disclosure, such as that of Chelsea Manning which resulted in 91,000 documents being posted on the WikiLeaks website regarding military action in Afghanistan.<sup>4</sup>
16. The WikiLeaks documents relating to Afghanistan are comprehensive. There are reports containing an extraordinary amount of sensitive information including names of operations, targets and objectives, accounts of what happened during an operation, summaries of reported events, timelines, lists of air assets and weapons in use in operations or events, names of informants, names of military staff and their emails and much more.
17. The publication of the Afghanistan war logs by WikiLeaks was not only condemned by various governments, but also criticised by human rights organisations such as Amnesty

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<sup>4</sup> Afghan War Diary at <https://wikileaks.org/afg/>

International,<sup>5</sup> and by press organisations including Reporters without Borders,<sup>6</sup> for putting lives at risk given the details and names that were published.

18. Requesters also pointed to instances where operational information has been disclosed by the relevant authorities through published interviews with military personnel, conference speeches, and books written by embedded journalists.<sup>7</sup> However, from what I have looked at, there is not the same level of detail contained in the authorised disclosures as in the leaked information.
19. The argument put forward is that, whether information has been leaked, or released with official approval, it is not feasible to now claim that New Zealand or its soldiers would be at risk from the release of very similar information. Bluntly put, the requesters contend the horse has bolted, and New Zealand's adversaries already have access to such tactical knowledge as it is in the public domain.
20. I am not attracted to the argument that there is no need to protect official information when similar information has already been leaked. One purpose of the OIA is to '*protect official information to the extent consistent with the public interest*' (section 4 of the OIA refers). The disclosure of requested information based on an earlier unlawful disclosure of similar information would not promote this purpose.
21. Nevertheless I acknowledge the point made that claims of risk to operational security must be realistic in the context of what information is already publicly available.
22. I raised these arguments with NZDF and queried its position on operational security given the amount of information publicly available. NZDF responded as follows:

*With respect to information available on Internet sites such as Wikileaks, we note that this material is specific to operations carried out by the United States or other Coalition partners. Much of the information that is publicly available relates to conventional forces and is not special operations force specific. Special operations forces have their own distinct tactics, techniques, and procedures which may differ quite markedly from those employed by conventional forces. There is no similar footage in the public domain in respect of any New Zealand Special Operations Forces operations. .... the NZDF's tactics, techniques, and procedures are similar to those of other nations' forces, but there are points of difference that could be exploited if known.*

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<sup>5</sup> <https://www.theguardian.com/world/2010/aug/10/afghanistan-war-logs-wikileaks-human-rights-groups>

<sup>6</sup> <https://www.theguardian.com/media/2010/aug/13/wikileaks-reporters-without-borders>

<sup>7</sup> See for example an Interview with MAJ Sholto Stephens, NZSAS, regarding his deployment in Afghanistan available at: <http://cgsc.contentdm.oclc.org/cdm/singleitem/collection/p4013coll13/id/1140/rec/1>

23. A requester suggested that the Pentagon had stated publicly that the Chelsea Manning leaks had no strategic impact on United States war efforts.<sup>8</sup> He commented that *‘[n]o one is going to die because of a New Zealand OIA response on this’*.
24. I asked NZDF for its perspective on the claim that this leaked information did not have a detrimental impact. NZDF noted that, in relation to the Afghanistan information, the relevant United States Department of Defense report states:<sup>9</sup>

*Although the IRTF [Information Review Task Force] assess there is not any ‘strategic impact’ to the release of this information, there is the potential for serious damage in two critical areas: 1) risks to intelligence sources, informants, and the Afghan population, and 2) US/NATO SIGINT collections methods and capabilities.*

25. My reading of this is that the leaking and publishing of this information did have an effect on the national security of the United States and other nations.
26. A risk to the security and defence of New Zealand does not necessarily require a lethal risk to soldiers to qualify for protection under section 6(a), although of course that may in fact be the case in a military setting. Where the release of information would make it harder to defend New Zealand or protect our nation’s security, I consider that section 6(a) will apply.
27. Taking into account that similar information publicly available on the internet is not the same information, is not about New Zealand Special Forces and is, in any case, the result of unauthorised disclosure, I am not persuaded that there is no appreciable risk associated with release of detailed operational information involving New Zealand.
28. It follows that I do not consider that NZDF is taking an excessively cautious approach to its assessment of operational security in relation to the information it holds.

## International relations

29. Section 6(a) is also intended to protect information which if released would be likely to prejudice the international relations of the Government of New Zealand.
30. In the context of military deployments, New Zealand’s size and historical ties mean we will often be working together with other nations in some form of coalition arrangement. Joining an international military deployment will involve shared use of resources and the exchange of information about the military capacity and tactics of other nation’s forces.

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<sup>8</sup> See the article at: <https://www.independent.co.uk/news/world/americas/us-politics/chelsea-manning-leaks-national-security-us-no-damage-report-us-a7801101.html>

<sup>9</sup> Reacted version of the United States Department of Defense report available at: [https://www.buzzfeed.com/jasonleopold/secret-government-report-chelsea-manning-leaks-caused-no?utm\\_term=.omqelk0ZZ#.ryAgwkWAA](https://www.buzzfeed.com/jasonleopold/secret-government-report-chelsea-manning-leaks-caused-no?utm_term=.omqelk0ZZ#.ryAgwkWAA)

31. Where requests are made for information generated in that deployment or about a particular coalition operation, national security concerns will frequently be intertwined with the question of potential harm to international relations.
32. When I have reviewed the Operation Burnham materials, I have primarily focused on the security and defence concerns, however as it was an operation involving coalition forces I am conscious that prejudice to international relations is also an important factor.
33. To the extent the requests capture operational information about the military capability, methods and technology of other nations' armed forces, I accept that disclosure of this information by New Zealand would be likely to be detrimental to our international relations with those nations.

### **Entrusting of information on a basis of confidence**

34. Section 6(b) provides good reason for the refusal of information where release would be likely to prejudice the future entrusting of information to the Government of New Zealand on a basis of confidence by other nations or an international organization.
35. If the New Zealand Government receives information in confidence from another nation, but breaches that confidence, for whatever reason, this is highly likely to have a chilling effect on our receipt of such information in the future.
36. Many countries have working arrangements with other nations regarding the exchange of intelligence and security related information. These arrangements are subject to an understanding of confidentiality whereby the information may only be disclosed with the consent of the originating nation or international agency. This understanding is sometimes referred to as the 'control principle'.
37. In the United Kingdom, the government vigorously defended the 'control principle' in a Court of Appeal case relating to the role of M15 in the torture of British resident Binyam Mohamed.<sup>10</sup> The case concerned the decision of a lower court to include information sourced from United States intelligence services in the open version of its judgment. There was nothing in the information itself which would involve a breach of security or that could be summarized as intelligence material, rather the argument was that any contravention of the control principle would result in a review of international intelligence sharing arrangements to the detriment of the United Kingdom.
38. Sir Igor Judge, the Lord Chief Justice, described the control principle as follows:<sup>11</sup>

*... in general terms, it is integral to intelligence sharing arrangements that intelligence material provided by one country to another remains confidential to the country which provides it and that it will never be disclosed, directly or indirectly, by the receiving country, without the permission of the provider of*

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<sup>10</sup> *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65

<sup>11</sup> *Ibid* at paragraph 44



*the information. This understanding is rigidly applied to the relationship between the UK and USA.*

39. While the Court concluded that the paragraphs at issue in this case ought to be disclosed, for reasons specific to the case, it endorsed the application of the control principle and the crucial importance of maintaining confidentiality over secret information supplied by other nations as a general rule. This case illustrates the grave consequences a breach of confidentiality can have at the international level.
40. Given that small countries such as New Zealand are likely to be net recipients of intelligence and security-related information from other countries, potential prejudice to the supply of such information is likely to be more significant for us than might be the case in larger countries with significant intelligence-gathering resources of their own.
41. One requester suggested to me that NZDF was avoiding its obligations under the OIA by requesting another country declassify the information supplied to New Zealand so that NZDF could release it here. The inference being that if NZDF held it, and thought it should be released, then why not do so? How is it that another country gets to decide?
42. I understand the sentiment expressed by the requester here. It does seem as if the 'control principle' effectively cuts across the operation of freedom of information laws in countries that are the recipients of security related information.
43. However, if one considers the wording of section 6(b), and the fact that there is no public interest test, then NZDF's decisions are consistent with its obligations under the OIA.
44. The test under section 6(b) is not whether there is a public interest in release of the information, or whether disclosure of the information itself would be damaging for security reasons. Rather the test is whether the disclosure of information would prejudice the New Zealand Government from receiving such information in the future. If there is a clear understanding that New Zealand received such information in confidence and the source of that information is opposed to its disclosure, then it is axiomatic that ignoring that obligation of confidence by releasing the information publicly will have serious consequences on the future supply of information from that source.
45. An Ombudsman on review of a refusal decision under section 6(b) needs to be satisfied that the information was supplied on an understanding that it will be held confidentially, and should take steps to confirm that the supplier of the information does not agree to its release at the time of the request. Having taken those steps the Ombudsman must determine whether, in the particular context of the case, there is a real and significant risk that its disclosure under the OIA will have a detrimental effect on the future supply of such information. If so, then section 6(b) will apply.

## Findings on specific refusals

### Rules of Engagement

46. Rules of Engagement (ROE) set the parameters upon which personnel working under the ROE can and cannot act in an operation. ROE are the operational tool to ensure troops act within the bounds of the Law of Armed Conflict.
47. At the NZDF press conference on 27 March 2017 about Operation Burnham, reference was made to the fact that New Zealand forces acted within the terms of their ROE. NZDF explained that in the deployment to Afghanistan it had pioneered the practice of sending a legal officer to ensure that personnel were fully trained in the ROE and to monitor compliance with the ROE.
48. One requester asked for a copy of the ROE in operation for New Zealand forces in August and September 2010. NZDF relied on section 6(a) and 6(b)(i) to refuse the request.
49. My investigators reviewed the general ROE that NZDF maintain, as well as specific ROE that were authorised for NZSAS operations in Afghanistan. Operation-specific ROE are set by selecting options from a range of detailed rules on various aspects of engagement contained in the general ROE package. These are chosen depending on what is appropriate for the specific purpose of the operation. Each topic of rules can vary from restrictive to permissive and cover matters that may arise in deployment such as what actions can be taken in self-defence, when prisoners may be taken, how to positively identify enemy combatants and when deadly force can be used.
50. NZDF's ROE were created in collaboration with another nation and are used in the most part by both defence forces. The other nation has not released its ROE publicly and has indicated its intention not to do so.
51. NZDF's refusal is centred on the concern that release of this information would give present or future adversaries sufficient knowledge to be able to use this against NZDF personnel on deployment. For example if an enemy combatant knew the extent of the actions that a soldier was permitted to take in self-defence, this would clearly give them an advantage. The collaboration on the creation of the ROE with another nation clearly raises the prospect that release would be detrimental to our international relations and the future entrusting of information to New Zealand in confidence.
52. The requester submitted that some information about the ROE was publicly available which suggests that the risk to operational security was not as high as was claimed by NZDF. The requester queried whether release of the Operation Burnham ROE now could really '*provide actionable intelligence that would be of immediate value to any future adversary*'. He referred to ROE changing in different operations, and did not see how the ROE from a previous single operation could have an impact on future operations.
53. The publicly available information referred to by the requester is in the nature of high-level guidance and is not the same as the detailed information NZDF is withholding. As

the ROE for a particular operation will be selected from a range of options contained in the general ROE, the same rules will be re-used in other operations, with some rules featuring more than others. Release of the rules for one operation will therefore give adversaries significant information about what rules may be in operation in a future operation.

54. While the requester argued that release of the ROE would not provide '*immediate value*' to an adversary, I think this defines the prejudice to security and defence too narrowly. The incremental release of pieces of information over time can effectively undermine security and defence even if its effect is not immediate.
55. The requester suggested that NZDF has effectively contracted out of the OIA by deciding to develop its ROE with another nation. He noted that NZDF's future operating concept appears to be that our operations will be enmeshed with that of our larger coalition partners, such as the United States and Australia, largely around the use of special forces. Against this background he suggests that '*[section] 6(b) of the OIA will become a shield of secrecy behind which NZDF can shelter.*'
56. As demonstrated by the report of the Danks Committee and the wording of section 6 enacted by Parliament, it was clearly envisaged that New Zealand would have relationships of this nature with other nations, and it was considered to be in the wider public interest to protect them. This is not 'contracting out' of the OIA, because the OIA explicitly envisages it and recognises that such relationships require protection.
57. In my opinion, the primary justification for withholding the ROE is because release would be likely to prejudice our security and defence in terms of section 6(a). I also consider there is a real and significant risk of prejudice to our international relations (section 6(a)) and to the future entrusting of confidential information (section 6(b)(i)) if this information were released. It is information that could directly affect the security and defence of another nation and that nation therefore would expect it to be protected.

## Location of Operation Burnham

58. In a press release on 26 March 2017 NZDF stated that its personnel had never operated in the villages named in *Hit & Run* as Naik and Khak Khuday Dad,<sup>12</sup> and that the geographical reference to the location of these villages in the book is approximately two kilometres north of where Operation Burnham took place. NZDF provided its own map of where Operation Burnham occurred and described this location as Tirgiran village.
59. *Hit & Run* authors, Nicky Hager and Jon Stephenson, then issued a statement confirming that the map in their book had identified the wrong location for the villages of Naik and Khak Khuday Dad. Nonetheless, the authors maintained that Operation Burnham did

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<sup>12</sup> NZDF statement on Hager/Stephenson book, 26 March 2017 at [www.nzdf.mil.nz/news/media-releases/2017/20170326-nzdf-statement-on-hager-stephenson-book.htm](http://www.nzdf.mil.nz/news/media-releases/2017/20170326-nzdf-statement-on-hager-stephenson-book.htm)

take place in those villages, and that those villages were in the same location that NZDF called Tirgiran village.

60. Two complainants made requests to NZDF aimed at clarifying the discrepancy between the account in *Hit & Run* and NZDF's public statements about the location of the operation. NZDF referred the requesters to the information it had already publicly released (section 18(d) of the OIA refers).
61. NZDF raised with me that the OIA does not require NZDF to venture opinions or provide comment on whether the claims made in the book are accurate nor does it require NZDF to explain the discrepancies between the account set out in the book, and NZDF's version of events.
62. I agree that the OIA is a mechanism to elicit information that is held, and cannot compel the generation of opinions or comment (except for the specific circumstances described in section 23 of the OIA, which is not relevant here).
63. Nevertheless a key plank of NZDF's rebuttal of *Hit & Run* was that the authors were wrong about the location of the operation, and appeared '*to have confused interviews, stories and anecdotes from locals*' from one operation with another operation. NZDF's rebuttal suggested that there was no connection between the account of events in the book and the operation that did take place.
64. Having reviewed information about the location of the Operation, I formed the provisional opinion that the information NZDF had publicly released did not fully reflect the information NZDF held on this issue, particularly in relation to the photos of buildings in *Hit & Run*. NZDF agreed to consider releasing some more information on this topic.
65. In its website release of 6 March 2018,<sup>13</sup> NZDF has included further information about the location, and about the photos of buildings in the book. I am satisfied that the information now released reflects what information NZDF held comparing the location of the operation to the location identified in *Hit & Run*. I consider that NZDF has now met its obligations under the OIA in respect of the requests received on this issue.

## Planning, execution and review of Operation Burnham

### Post activity reports

66. Several requesters asked for copies of post activity reports and battle damage assessment reports to get a fuller picture of the operation. NZDF refused these requests under section 6(a) on the basis that release of this information would likely prejudice the security and defence of New Zealand by providing insight into operational capability and tactics.

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<sup>13</sup> [http://www.nzdf.mil.nz/downloads/pdf/public-docs/2018/op\\_b\\_information\\_pack\\_v2b.pdf](http://www.nzdf.mil.nz/downloads/pdf/public-docs/2018/op_b_information_pack_v2b.pdf)

67. The information reviewed by my investigators includes documentation created in preparation for the operation, reports and documents produced after the operation, and email communications between NZDF personnel in Afghanistan and in New Zealand about how the operation went. The information contained in these documents includes details of military planning, operational tactics, intelligence information, and information about the weapons, equipment, air support options and the technical capabilities of New Zealand forces and Coalition forces.
68. NZDF submitted that release of this information would reveal how an operation is planned, how troops will act in a given situation, and what air support and weaponry is available to them. It would also reveal how and from where intelligence is gathered, along with how such information is used. Details like this could be used to gain an advantage over New Zealand forces in the future.
69. The information at issue is very detailed like the information contained in the Afghan War Diary on WikiLeaks. I am persuaded that the release of this information in full would compromise the security of New Zealand forces by revealing how the NZSAS operates, how they are equipped and how the NZDF gathers intelligence.
70. The information at issue also contains operational information about the military capabilities of other nations. I have no doubt that release of such information would be viewed negatively by those other nations which would adversely impact our ability to work with them in the future. This presents a real and significant risk to the defence and security of New Zealand.
71. Requesters submitted that the account of Operation Burnham described in *Hit & Run* needs to be answered by the release of detailed information that would either confirm or dispel the claims made. This is, in my view, a public interest argument for accountability that is not a consideration I can take into account when assessing whether section 6 withholding grounds are made out.
72. I did consider whether it would be possible to redact documents in such a way that they could be released without prejudicing the interests protected by section 6(a) and 6(b)(i) of the OIA. I concluded that it simply is not possible without rendering the documents unintelligible. However I agree that there is no reason to withhold the facts of what happened in Operation Burnham in respect of New Zealand's role given the passage of time and the fact that we no longer operate in Afghanistan.
73. NZDF did release the facts about what happened in Operation Burnham when it gave a summary at its press release responding to *Hit & Run* in March 2017. I have carefully compared the information contained in the summary with the information at issue in this case. I can say that, aside from some aspects of the summary which have now been addressed by the March 2018 public release, I am satisfied that the information released by NZDF accurately reflects the information it holds about the events of Operation Burnham.

74. In my opinion, NZDF's decision to refuse the requests for post activity reports and related information about the events and aftermath of the operation was justified under sections 6(a) and 6(b)(i).

### Titles and dates of post activity reports

75. NZDF had also refused a request for the titles and dates of post activity reports in the month following Operation Burnham. After discussion with my Office, NZDF agreed to release a list of reports and dates and titles subject to the redaction of any information protected by sections 6(a) or 6(b) of the OIA. This list is included in the March 2018 package of information on the NZDF website. Having considered the information at issue, I am satisfied that NZDF has released as much as it can in this respect, and that the remainder is withheld under section 6(a) or 6(b) for the reasons explained above.

### Video footage

76. Requests for video footage of the operation were refused under section 6(b)(i) on the basis that this was supplied to New Zealand in confidence by the United States and release of this footage would prejudice the future entrusting of information to us. NZDF advised requesters that the United States authorities had been approached to see if it was prepared to 'declassify' the footage to permit its release, but that confirmation was not received.
77. NZDF indicated that it would be unusual for the United States to 'declassify' such imagery for public release. On the other hand, requesters provided me with links to United States military websites containing military air strike footage which would suggest that in those instances the release had been officially sanctioned.
78. My investigators viewed the footage at issue, and also viewed the correspondence with the United States authorities about whether the footage can be declassified. I can confirm that the NZDF request for declassification was accompanied by an explanation of the context about the publication of allegations of civilian casualties, and NZDF's desire to be able to show the public what happened during the operation. At the time of my provisional opinion, the United States had not agreed to declassify the footage.
79. I accepted that, in the absence of confirmation from the United States that the footage had been declassified, release of the footage in New Zealand would jeopardise our ability to receive such information in the future. I therefore accepted in my provisional opinion, that section 6(b)(i) provided the NZDF with good reason to refuse the request at the time it was made, but I asked NZDF to keep me informed of any further communications with the United States on this point.
80. In February 2018, NZDF received a formal response from the Chairman of the Joint Chiefs of Staff, General Dunford. General Dunford advised that after consultation with United States Central Command, it was confirmed that public release of the video footage could reasonably be expected to cause serious damage to United States national interests. Declassification and public release were not approved.

81. This letter is compelling evidence that if New Zealand were to release the footage supplied in confidence by the United States, against the wishes of the United States, that this would be likely to prejudice the entrusting of any further information to us by that nation.
82. In my opinion, NZDF was entitled to rely on section 6(b)(i) to refuse requests for the video footage of Operation Burnham.

## Photographs

83. The NZDF refused one request for photographs taken during the operation on the basis that no photos existed (section 18(e) of the OIA refers). This contradicted NZDF's own press conference material which contained three photographs. NZDF subsequently corrected its error and released all the photographs it had.
84. The requester in his complaint to me was understandably sceptical about NZDF's claim that no further photographs existed given that the same claim made earlier had been proven wrong. Requesters also queried the small number of photographs available as they understood that more photographs typically would be taken, particularly when NZDF would wish to confirm details of insurgent casualties.
85. I specifically raised these queries with NZDF during my investigation and NZDF confirmed that very few photographs were taken. All of the photographs that existed were released to the requester, and have also now been publicly released as part of the March 2018 website package. I am satisfied that NZDF has released all the photographs it holds.

## Civilian and insurgent casualties

86. On 23 August 2010, ISAF Joint Command released a press statement briefly summarising the operation that had been conducted the day before. The statement reported that the operation resulted in 12 dead insurgents and the recovery of weapons and that *'[n]o civilians were injured or killed during this operation'*.
87. On 29 August 2010, ISAF Joint Command issued a revised statement entitled *'Joint assessment team confirms possibility of civilian casualties in Baghlan'*. The statement confirms that following concerns expressed by the Baghlan provincial governor about civilian casualties, an assessment of the operation was carried out. The assessment found that several rounds from coalition helicopters fell short as a result of a gun site malfunction and struck two buildings *'which may have resulted in civilian casualties'*. The ISAF Joint Command Director stated *'Our thoughts and concerns are with the family and friends of those civilians who may have been injured or killed'*.
88. On 20 April 2011, NZDF issued a media release about the operation, which made the following reference to the issue of civilian casualties:

*Following the operation allegations of civilian casualties were made. These were investigated by a joint Afghan Ministry of Defence, Ministry of Interior*

*and International Security Assistance Force assessment team, in accordance with ISAF procedures.*

*The investigation concluded that the allegations of civilian casualties were unfounded.*

89. On 21 March 2017, NZDF repeated the above statement in a short media release.
90. In its press release of 26 March 2017, NZDF amended its position to state that the ISAF investigation concluded that the gun sight malfunction *'may have resulted in civilian casualties but no evidence of this was established'*.
91. On 27 March 2017, the speaking notes for the NZDF press conference were released, and the notes for Colonel Lisa Ferris's explanation of the ISAF investigation process confirmed the findings of the ISAF assessment team to be that *'civilian casualties may have been possible'*.
92. A number of requesters commented on the discrepancy between NZDF's earlier press statements about civilian casualties and the ISAF press release of 29 August 2010. Requests were made for the ISAF assessment report and for information about civilian or insurgent casualties.

## ISAF assessment report

93. NZDF refused the requests for this report under section 6(b)(ii) on the basis that *'its release would likely prejudice the entrusting of information to the Government of New Zealand on the basis of confidence by NATO'*.
94. I have read the report and seen evidence which demonstrates that the report was supplied to NZDF in confidence by NATO. NZDF confirmed to me that it would have no concerns about release of this report, other than the fact that NATO has supplied it in confidence.
95. I consider this report to be one of the key documents at issue in my investigation of these complaints. Its release would explain ISAF's conclusions on the role that the NZSAS played in the operation, and why the NZDF has taken the position that it has. As such, I think it would certainly be in the interests of transparency and accountability if this report could be released.
96. Despite the obvious public interest that disclosure would serve in this case, the conclusive nature of section 6 of the OIA provides me with no scope to consider any countervailing public interest in disclosure of the information at issue.
97. In my provisional opinion, I indicated that I was satisfied that release of the report by NZDF, contrary to NATO's agreement, would breach NZDF's obligation of confidence to NATO and that this would be likely to prejudice the future supply of such information. I asked the Chief of Defence Force to contact NATO to obtain an official response about the possibility of declassifying the report.



98. I have been shown letters from General Petr Pavel, Chairman of the NATO Military Committee, which were sent to the Chief of Defence Force in February and March 2018. The letters refer to NZDF's request for the summary of the ISAF investigation into allegations of civilian casualties. General Pavel initially wrote that the request was being evaluated, and in March he advised that unfortunately NATO had concluded that the report could not be declassified or released to the public due to the sensitivity of the information it contained.
99. General Pavel's letter confirms for me that release of this report by New Zealand without NATO's approval, would be likely to prejudice the future entrusting of information to the Government of New Zealand by NATO.
100. It follows that I consider NZDF was justified in refusing requests for this report under section 6(b)(ii).

### Questions about civilian casualties

101. One requester asked for information and evidence relied on by NZDF to maintain the public position, for six years, that claims of civilian casualties were '*unfounded*', and also sought the information which prompted NZDF to amend its position to state that civilian casualties were '*possible*'.
102. Sections 6(a) and (b) apply to much of the information captured by this request such as post activity reports, video footage and the ISAF report. I therefore asked NZDF if it would be willing to consider providing an explanation to the requester about the language it used in public statements about civilian casualties by drawing on information held but without revealing any classified information.
103. NZDF wrote to the requester with quite a comprehensive explanation in November 2017. In its March 2018 public release, NZDF also clarified its position as regards the possibility of civilian casualties and has accepted that some of its earlier press statements seemed inconsistent with the ISAF press releases.
104. I am satisfied that NZDF's letter to the requester is an accurate summary of the information held that it was able to release.

### Identification of people killed

105. Three Parliamentary Questions put to the Minister of Defence were later submitted as OIA requests to NZDF.<sup>14</sup> These requests relate to the identification of '*presumed insurgents*' killed in the operation.
106. NZDF relied on section 18(d) to refuse these requests on the basis that the Minister had answered these questions in Parliament. While some questions about deaths of named insurgents were answered by the Minister, he responded to three of these questions

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<sup>14</sup> PQs 2321-2322 (2017)

with the answer *'this information will not be released'*. Clearly then the information was not publicly available, and NZDF's reliance on section 18(d) was not justified.

107. One question asked how many identities were known of the nine insurgents NZDF says were killed during the operation. The other two questions asked whether named individuals (Islamuddin, Mohammad Iqbal, and Abdul Qayoom) were among the nine *'presumed insurgents'* killed.
108. During my investigation NZDF accepted that this information was not publicly available from the Minister's response in Parliament, however it was suggested to me that any further response would raise operational security concerns and therefore good reason exists under section 6(a) to withhold this information.
109. While I was aware of the nature of NZDF's concerns, which I cannot reveal as this would itself prejudice interests protected by section 6(a), I did not agree with NZDF that this meant the questions could not be answered. I formed the provisional opinion that NZDF should answer these questions and could do so without reference to material that would risk operational security.
110. In March 2018, NZDF released information confirming that the NZSAS were able to identify the person that they had killed as an insurgent. No further information has been released that would respond to these questions. I have therefore issued a recommendation that NZDF answer the questions.

## **NZSAS treatment of a prisoner**

111. *Hit & Run* alleges that an SAS member assaulted Qari Miraj, an insurgent captured in January 2011, while he was under SAS guard, and that the SAS then handed him over to authorities that had a reputation for torture and mistreatment of prisoners.
112. A request was made for information held that related to the allegations about Qari Miraj. NZDF refused this request on the basis that these allegations were being investigated and release of any information would likely prejudice the maintenance of the law (section 6(c) refers).
113. During my investigation into these OIA complaints, NZDF completed its investigation into the allegations. I indicated in my provisional opinion that while I was inclined to accept the application of section 6(c) to the information at the time the request was made, the NZDF should consider releasing the investigation report, which might resolve the complaint.
114. NZDF has now released copies of two reports with redactions. I acknowledge NZDF's actions in this regard, however given the high level summary nature of these reports, I accept that this will not satisfy the requester.
115. My role under the OIA is to form an opinion on the appropriateness of NZDF's decision at the time the decision was made. In that respect, I confirm as my final opinion that NZDF

was entitled to refuse the request under section 6(c) as I consider it likely that release of the information sought, at that particular point in time, would have prejudiced the conduct of that investigation.

116. Now that the investigation is complete, it is open to the requester to make a fresh request for the information he seeks, and he has now done so.

## **Government knowledge about the operation**

117. The authors of *Hit & Run* suggest that the truth of what happened in Baghlan province on 22 August 2010, and of NZSAS conduct towards Qari Miraj has been suppressed. Allegations are made of a 'cover-up' by NZDF possibly extending to the Prime Minister and successive Ministers of Defence. This has sparked a number of requesters to ask for copies of briefings and other information provided to the government.
118. The information captured by the requests includes briefing material to the government going back to 2010 immediately following Operation Burnham, and briefings given following on from the publication of *Hit & Run*. One requester also asked how many minutes and seconds of footage shown to former Prime Minister Bill English.
119. NZDF released a copy of a briefing note, dated 30 March 2017, from the Chief of Defence Force to the Minister of Defence. The remaining information was refused under section 6(a) on the basis that release of this information would provide insight into operational capacity and tactics, and under section 9(2)(h) on the basis that release of two legal opinions would breach legal professional privilege.

## **Legal opinions**

120. One legal opinion was prepared by Crown Law and provided to the Attorney-General, while the other was prepared by the Defence Legal services and provided to the Chief of Defence Force. These opinions advise the Attorney General and the Chief of Defence Force about the allegations.
121. I formed the provisional opinion that legal professional privilege did apply to these two documents, and that the public interest considerations did not outweigh the need to maintain that privilege in light of information that had already been publicly released. Requesters have accepted my findings in this respect, and I therefore confirm my opinion that NZDF was entitled to withhold this information under section 9(2)(h).

## **Briefing material**

122. My investigators have reviewed briefing documents from March and April 2017 which is the material held by NZDF that it considers to have been captured by the various requests. One brief includes in its appendices briefing notes from the former Chief of Defence Force in 2010.

123. I formed the provisional opinion that section 6(a) did not justify withholding these briefing materials in full. NZDF agreed to review its position with a view to releasing the briefings, potentially with some redactions.
124. In March 2018, NZDF publicly released the same briefing paper that it had earlier released to some requesters. NZDF also released the number of minutes and seconds of the video footage that was made available to the former Prime Minister while briefing him. No further information was released at that time.
125. I queried the absence of briefing information with NZDF. After some discussions, NZDF has now indicated that it is prepared to release further briefing material with redactions under sections 9(2)(a), 6(a) and 6(b)(ii). I have viewed this material and discussed the proposed redactions with NZDF. I accept that there are some minor redactions justified under sections 9(2)(a) and section 6(a) to protect the privacy and operational effectiveness of individual staff, and some minor operational details.
126. The other redacted material describes the ISAF investigation process and conclusions. I accept that its release would prejudice the future entrusting of information to New Zealand for the same reasons that apply to the ISAF report. I therefore consider section 6(b)(ii) applies.
127. I have made a recommendation about the release of this briefing material below.

## Chief Ombudsman's Opinion

128. For the reasons set out above, I have formed the opinion that:
- a. NZDF was justified in its refusals of various requests for information about Operation Burnham, including the Rules of Engagement, documentary material about the events of the operation, video footage and the ISAF report under sections 6(a) and (b) of the OIA.
  - b. NZDF was justified in its refusal of information about the alleged mistreatment of Qari Miraj under section 6(c) of the OIA.
  - c. NZDF's decision to withhold the information which would answer the questions asked about the identification of insurgents killed was not justified.
  - d. NZDF's refusal of requests for copies of briefing material to the Government was:
    - i. justified under section 9(2)(h) in relation to the legal opinions at issue and some minimal redactions under sections 9(2)(a), 6(a) and 6(b)(ii); and
    - ii. not justified in respect of the remainder.

## Recommendations

129. I recommend NZDF answer the questions in the table below in the manner indicated:

Questions	Response
Of the 9 insurgents that the NZDF claims were killed during the 22 August 2010 SAS raid in Baghlan Province Afghanistan, how many does it know the identity of?	the number
Was the school teacher Islamuddin, who was killed during the 22 August 2010 SAS raid in Baghlan Province, Afghanistan, one of the nine insurgents whom NZDF claims were killed?	yes / no/ don't know
Were Mohammad Iqbal and his son Abdul Qayoom, who were killed during the 22 August 2010 SAS raid in Baghlan Province, Afghanistan, two of the nine presumed insurgents whom NZDF claims were killed?	yes / no/ don't know

130. I recommend that NZDF release copies of the following documents with the redactions that I have specifically accepted in my communications directly with NZDF:

- Dot point brief for VCDF dated 22 March 2017
- Dot point brief for CDF dated 23 March 2017 including Annexes A-F
- Cover sheet for briefing to Minister of Defence and PM dated 29 March 2017
- Speaking notes for CDF's oral briefing to PM on 3 April 2017

131. Under section 32 of the OIA, a public duty to observe an Ombudsman's recommendation is imposed from the commencement of the 21st working day after the date of that recommendation. This public duty applies unless, before that day, the Governor-General, by Order in Council, otherwise directs.



Peter Boshier  
Chief Ombudsman

## Appendix 1. Relevant statutory provisions

### Official Information Act 1982

#### 6 Conclusive reasons for withholding official information

Good reason for withholding official information exists, for the purpose of section 5, if the making available of that information would be likely—

- (a) to prejudice the security or defence of New Zealand or the international relations of the Government of New Zealand; or
- (b) to prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by—
  - (i) the Government of any other country or any agency of such a Government; or
  - (ii) any international organisation; or
- (c) to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial; or
- (d) .....

#### 9 Other reasons for withholding official information

- (1) Where this section applies, good reason for withholding official information exists, for the purpose of section 5, unless, in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available.
- (2) Subject to sections 6, 7, 10, and 18, this section applies if, and only if, the withholding of the information is necessary to—
  - (a) protect the privacy of natural persons, including that of deceased natural persons; or
  - .....
  - (h) maintain legal professional privilege; or

## Appendix 2.

### Timeline of investigation

23 August 2017	I notified NZDF of my investigation into the five complaints.
29 August 2017	I met with the Chief of Defence Force and his staff to discuss the complaints received.
September 2017	My investigators attended NZDF offices on six occasions to review the information at issue and discuss NZDF concerns about release with various personnel.
31 October 2017	I met with the Chief of Defence Force to discuss my preliminary thinking, and explore options for resolution. NZDF agreed to consider releasing further information.
7 November 2017	I provided NZDF with my written provisional opinion.
8 December 2017	NZDF confirmed it was taking steps to release further information along the lines proposed in my provisional opinion.
22 December 2017	I provided the five requesters with my provisional opinion on their complaints in respect of the information that I considered NZDF was entitled to refuse.
24 January 2018	I received requesters' comments in response to my provisional opinion.
28 February 2018	I wrote to NZDF seeking an update on the proposed public release of further information, and asking for a response on some points raised by requesters in their comments to me.
6 March 2018	NZDF released some further information on its website
12 March 2018	NZDF replied to my letter with comments, and advised me about the public release of the information on its website.
13 March 2018	We advised requesters of the public release and invited any further comments from requesters by 20 March 2018.

## Appendix 3.

### Requests and responses

Request	NZDF original response
<b>Rules of Engagement</b>	
The ROE for NZSAS/Coalition Baghlan operation in August 2010	6(a) and 6(b)(i)
The ROE for subsequent operation in the area in September 2010	
<b>Location of Operation Burnham</b>	
Questions on Twitter about location of Operation Burnham in comparison to locations on maps identified in Hit & Run and whether the buildings identified are the same ones as in the book.	18(d)
Did you provide any Ministers with any information regarding the books accuracy in regards to the buildings? If so, what was it? If not, why not?	6(a)
Noting that Hit & Run authors have explained publicly that they made an error in the location of the villages Naik and Khak Khuday Dad in the book Hit and Run, do you now accept that the Operation Burnham described in the book refers to the same NZDF Operation Burnham that you talked about in your press conference on 27 March. Please provide NZDF emails and reports discussing this point.	Operation Burnham took place as described in the press conference ion 27 March 2017.
Do you now accept that the ‘Tigiran’ village location referred to in your press conference on 27 March 2017 (as the site of the NZDF Operation Burnham) is the same location described as Naik and Khak Khuday Dad in Hit & Run? Please provide NZDF emails and reports discussing this point	Already replied to.
<b>Post activity reports</b>	
Copies of any after action reports filed from the August 2010 raid involving the NZSDAS in Baghlan	6(a)
Copies of any inquiry report or review documentation carried out by NZDF into the August 2010 raid	18(e)



Request	NZDF original response
Copies of all post activity NZDF reports on Operation Burnham and subsequent reports of civilian or insurgent casualties during the operation	6(a)  No subsequent reports of civilian or insurgent casualties during the Operation have been created by NZDF. Other information relating to civilian or insurgent casualties is withheld under s6(a).
Copy of the Battle Damage Assessment report on the operation and subsequent October mission	6(a)
What are the titles and dates of all NZDF and Special Air Service post activity and other reports relating to the 22 August 2010 SAS in Baghlan Province, Afghanistan, if any that were prepared in the month following the raid?	18(d) – answered by Minister
<b>Video footage and photographs</b>	
Copies of all video a still imagery captured during the August 2010 raid involving NZSAS in Baghlan province	18(e)
Copies of any video and still imagery supplied to NZDF from other nations from the August 2010 raid	18(e) still imagery 6(b)(i) video
<b>ISAF documents</b>	
Copies of any inquiry report or review documentation carried out by ISAF following the raid	6(b)(ii)
Copy of the ISAF inquiry report into civilian casualties that occurred during the 22 August Operation Burnham	
<b>Civilian casualties</b>	
Requester seeking documented and undocumented information and evidence relied on, that explains NZDF’s position on whether the August 2010 SAS operation in Baghlan resulted in any civilian casualties and why that position changed.	Referred to publicly available information and 6(a) - reports on the operation 6(b)(ii) – ISAF report
<b>Identity of insurgents killed</b>	
Of the 9 insurgents that the NZDF claims were killed during the 22 August 2010 SAS raid in Baghlan Province Afghanistan, how many does it know the identity of?	18(d) – answered by Minister
Was the school teacher Islamuddin, who was killed during the 22 August 2010 SAS raid in Baghlan Province, Afghanistan, one of the nine insurgents whom NZDF claims were killed?	18(d)– answered by Minister

Request	NZDF original response
Were Mohammad Iqbal and his son Abdul Qayoom, who were killed during the 22 August 2010 SAS raid in Baghlan Province, Afghanistan, two of the nine presumed insurgents whom NZDF claims were killed?	18(d)– answered by Minister
<b>NZSAS treatment of a prisoner</b>	
In your press conference on 27 March 2017, you said that an inquiry was under way concerning allegations of the torture of the captured insurgent Qari Miraj. What is the result of this inquiry?	6(c)
All NZDF emails and documents on the subject of Qari Miraj and his torture, Qari Miraj and his beating by an SAS soldier, what actions NZDF has taken about Qari Miraj and his beating by an SAS soldier	
<b>Correspondence, briefings and advice</b>	
Copies of any advice provided by NZDF to Cabinet and the PM regarding the August 2010 raid, and the dates on which that was provided	9(2)(h) and 6(a)
Copies of any and all correspondence between the NZDF and the offices of the PM and the Minister of Defence regarding the release of the book ‘Hit and Run’ and the allegations it raised	9(2)(h) and 6(a)
How many minutes and seconds in length was the video footage shown to the PM as part of the briefing from the Chief of the Defence Force?	6(a)
All documentation produced in the days following the launch of the book Hit & Run relating to NZDF responses to the book [including] copies of all communications between the NZDF and the Defence Minister, PM, Defence Minister’s office and PM’s office.	9(2)(h) and 6(a)